Supreme Court, U.S.
FILED
JUN 5 1992
OFFICE OF THE CLERK

NO. 91-1522

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. HABERSTROH,
District Attorney of Blair
County, Pennsylvania, et al.,
Petitioners

v.

WAYNE PAUL BURKETT,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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ARGUMENT

Respondent has filed a supplemental brief addressing this Court's recent decision in United States v. Williams, 60 U.S.L.W. 4348 (U.S. May 4, 1992). Respondent asserts that Williams confirms his argument that petitioner has "waived" his claims and that the petition for certiorari must be denied on this basis. As the

Williams opinion was not available to petitioner when his previous briefs were prepared, this supplemental brief is filed under Sup. Ct. R. 15.7.

Respondent focuses on only one element of Williams, carefully ignoring the most significant aspects of the opinion, which, far from weakening petitioner's position, support the grant of certiorari here. In Williams, this Court reiterated its "traditional rule" that, as long as the question presented was "pressed or passed upon below," there is no bar to the grant of review. The rule, emphasized the Court, operates in the disjunctive: certiorari may be granted on a question either if the petitioner raised the question below, or if the court addressed the question below, even if the petitioner had not raised it. The Court then found that this rule allowed review in the Williams case, because the court of appeals there had squarely decided

the issue in question. 60 U.S.L.W. at 4350.

Then, as an added consideration, the Williams Court observed that, although the issue in question there had not been raised below, the petitioner had raised the same issue, unsuccessfully, in a previous appeal that had set circuit precedent, and so could not be expected to contest it again in the court of appeals. Respondent seizes on this point, treating such prior litigation as a prerequisite for this Court's review. It is clear, however, that Williams did not so repeal the "traditional rule." This is apparent both from the Court's unqualified restatement of the rule, and from its reliance on Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991). In Stevens, even absent any indication that the petitioner had ever raised the question presented -- whether in the case at hand or in any other case -- the

Court dismissed the respondent's objection to review, because the question had been addressed by the court below. Thus, the "pressed or passed upon" rule was affirmed, not abrogated, in Williams.

Respondent nonetheless challenges the wisdom of this Court's practice on the ground that it places him at a strategic disadvantage by allowing a certiorari petitioner to "sandbag" his opponent. This complaint is empty as a matter of fact and policy. First, no litigant is going to hide a claim while in the lower courts in order to surprise the other side by raising the issue for the first time in a certiorari petition. The chance of certiorari being granted is so slim that such a tactic would be foolish. More importantly, the rationale of the "pressed or passed upon" proposition is that this Court's power of review should not be limited solely by the parochial interests of particular

litigants. If an issue placed before this Court -- either because it was raised below or because it was ruled on below -- is sufficiently consequential, the Court should have the discretion to consider it.

In any event, there is an important distinction between this case and Williams, which respondent has sidestepped, but which renders review here all the more appropriate. In Williams, the court of appeals simply applied prior circuit precedent, without modification. Here, in contrast, the court of appeals significantly expanded prior precedent, sua sponte, by holding not only that the Sixth Amendment applies to post-verdict delay, but that such delay may be remedied by sentence reduction. Petitioner never had a chance to argue this issue below, because respondent had never asked for such a holding, and the question entered the case for the first time with

the filing of the court of appeals opinion.[1] By raising the stakes in this

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[1]Moreover, respondent hyperbolizes in contending that petitioner, in respondent's prior habeas corpus proceedings (Civil Action Nos. 85-769, 85-1965-66), "conceded" and "embraced" the correctness of the general rule applying the Speedy Trial Clause to post-verdict delay. Petitioner was not yet in office during the relevant events in those proceedings, which occurred in 1985. It was then that the state filed answers to respondent's original habeas petitions, and that the magistrate issued his reports and recommendations. 3d Cir. App. 2107-2121. The state did not specifically contest the proposition that the Sixth Amendment applied to post-verdict delay, and the magistrate treated it as settled law.

Had petitioner, after becoming District Attorney, thereafter attempted to argue to the contrary when the case reached the Third Circuit on respondent's first appeal (Nos. 86-3074, 86-3121), respondent would no doubt have asserted that the state had waived any such argument by failing to file objections to the magistrate's reports and recommendations. By the time the present proceedings began with a new habeas petition (Civil Action No. 88-1397), the Third Circuit had already established its binding precedent on the Sixth Amendment question.

In addition, even after he entered the proceedings, petitioner's actions hardly amounted to "conceding" or "embracing" the correctness of the rule in question. Petitioner never stated his agreement that the

(continued...)

manner, the decision below increases the need to examine the threshold question of the scope of the Speedy Trial Clause in the post-verdict context.

Respondent does not contest this point. Nor does he contest other important points: that his "waiver" claim, whatever its merits, relates only to the first of the three questions presented in the petition for certiorari; that there is no possible waiver as to the two remaining questions presented; and that the first question is fairly comprised within the other two. Accordingly, there is no procedural basis to deny review of any, let alone all, of the questions presented in the certiorari petition.

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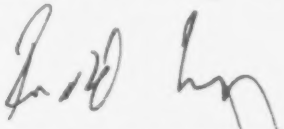
[1](...continued)
Speedy Trial Clause should apply to post-verdict proceedings; he merely treated the issue, as the magistrate had, as settled. Considering that every federal appellate decision to that time had done the same, see Petition for Certiorari at 20-22, such a standpoint was unremarkable.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,



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